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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 962. 598

HENRY O. HARKNESS, APPELLANT,

vs.

RUSSELL AND COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED SEPTEMBER 19, 1885.

SUPREME COURT OF THE UNITED STATES.

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IN THE SUPREME COURT,

UTAH TERRITORY.

RUSSELL & CO.,
Respondents,
vs.
H. O. HARKNESS,
Appellant.

TRANSCRIPT
OF
RECORD.

BENNETT, HARKNESS & KIRKPATRICK,
Counsel for Respondents.

KIMBALL & HEYWOOD,
Counsel for Appellant.

Filed September 16, 1884.

E. T. SPRAGUE, Clerk.

IN THE DISTRICT COURT,

FIRST JUDICIAL DISTRICT, COUNTY OF WEBER,
UTAH TERRITORY.

RUSSELL & CO.,
Plaintiffs,

vs.

H. O. HARKNESS,
Defendant.

The plaintiff complains of the defendant and alleges:

That the plaintiff is, and at all the times herein mentioned has been, a corporation organized under the laws of the State of Ohio, at Massillon, in said State. That on and prior to the 2d day of October, 1882, the plaintiff was the owner and in the possession, and has ever since been the owner, of one Sixteen-horsepower Steam Engine and Boiler, No. 1,026, and a portable sawmill, No. 127, with fixtures complete, the mill being suitable to be worked with said Engine, and all of the value of over twenty-one hundred dollars; and plaintiff at the same time was also the owner and in the possession, and has ever since been the owner of a Twenty-five-horsepower Steam Engine and Boiler

No 1,231, and a portable saw-mill with fixtures complete, No. 327, the mill suitable to be worked with said engine, all of the value of over twenty-seven hundred dollars.

That on the 2nd day of October, 1882, the plaintiff delivered all said property to one Phelan and one Ferguson, whose first names are unknown to plaintiff, but who were partners in the firm name of "Phelan and Ferguson," and dealt with plaintiff in their firm name under an executory conditional contract for the sale thereof, then made between said Phelan and Ferguson, by which the said Phelan and Ferguson agreed to pay the plaintiff for said Sixteen-horse-power Engine, Boiler and the saw-mill and fixtures going therewith, the sum of $2,190, and for said Twenty-five-horsepower Engine, Boiler and saw-mill and fixtures going therewith, the further sum of $2,798. That said Phelan and Ferguson paid down a small part of the purchase price, and gave notes for the balance of the purchase price and interest thereon. That it was agreed that said Phelan and Ferguson should have temporary possession and use of said property, and that until the whole of the agreed purchase price was paid by them, the title and right to possession of all said property, should be and remain in the plaintiff, and should not pass from the plaintiff until the whole of the said purchase price and interest were fully paid and said Phelan and Ferguson received the property on and under said agreement.

That said Phelan and Ferguson gave to the plaintiff their notes for most of the purchase price of said property, as evidence of the time and manner in which they agreed to pay for said property, and receive the title, and among other notes so given are the four following given by them as a part of the purchase price of said Sixteen-horsepower Engine, Boiler, and Mill going therewith, to wit:

One note for $300, payable to the order of the plaintiff at the bank of Wells, Fargo & Co., in Salt Lake City, Utah, May 1, 1883, with interest at 10 per cent. per annum from date, and with interest at 2 per cent. per month from maturity till paid.

One note for $300, payable to the order of the plaintiff on the 1st day of Nov., 1883, at said bank, with interest at 10 per cent per annum and with interest at 2 per cent per month from maturity till paid.

One note for $300, payable to the order of the plaintiff at said bank on the 1st day of May, 1884, with interest at 10 per cent. per annum and with interest at 2 per cent. per month from maturity till paid.

One note for $275, payable to the order of the plaintiff at said bank November 1, 1884, with interest at 10 per cent. per annum, and with interest at 2 per cent per month from maturity till paid.

That of the notes so given for part of the purchase price of said Twenty-five-horsepower Engine, Boiler and mill going therewith, are the following:

One note for $450, payable to the order of the plaintiff at said bank August 1st, 1883, with interest at 10 per cent. per annum and with interest at 2 per cent per month from maturity till paid.

One note for $450, payable to the order of the plaintiff at said bank August 1884, with interest at 10 per cent ,per annum, and with interest at 2 per cent, per month from maturity till paid.

One note for $560,50, payable to the order of the plaintiff February 1, 1885, with interest at 10 per cent. per annum, and with interest at 2 per cent per month from maturity till paid.

That each of said seven notes is still owned and held by plaintiff, and is wholly unpaid.

That each of said notes contains a provision for the payment of a reasonable attorney's fee, and any cost that may be incurred in any action or proceeding for the collection thereof, and each contains this provision, to wit. "The express condition of this transaction, is such that the title ownership, or possession of said Engine, Boiler and Saw-mill, does not pass from the said Russell and Co., until this note and interest shall be paid in full, and the said Russel and Co., or his agent, has full power to declare this note due and take possession of the said Engine, Boiler and Saw-mill, when they deem themselves insecure even before the maturity of this note."

It was also provided in each note that "In case said Engine, Boiler and Saw-mill shall be taken back; Russell and Co. may sell the same at public or private sale without notice, and apply the proceeds on this note, or they may without sale endorse the true value of the property on this note, and we agree to pay on this note any balance due thereon after such endorsement, as damages and rental of said machinery."

And the plaintiff further alleges that on or before the 9th day of March, 1883, the said Phelan and Ferguson had become insolvent and unable to pay their debts, and had delivered all said property to the defendant, who, as plaintiff is informed and believes received said property, with full notice of plaintiff's rights, and in consideration of a prior indebtedness to him of said Phelan and Ferguson.

That on the 10th day of March, 1883, the plaintiff gave said Phelan and Ferguson, and the defendant herein, notice that the plaintiff deemed itself insecure and elected to consider the notes aforesaid due, and demanded the possession of said property from them, and each of them, but that the said Phelan and Ferguson, and also the defendant, refused to sur-

render said property or any part thereof, and the defendant, who was then in possession, refused to surrender the property, and claimed title thereto under an alleged sale thereof from the said Phelan and Ferguson. And on information and belief the plaintiff alleges that the said defendant has since said demand sold and delivered all said property to some other person or party, and has converted the same to his own use.

That the value of said Sixteen-horsepower Engine, Boiler and Saw-mill going therewith, at the time the defendant received the same and at all times since has been as much as the sum of $1,500, and the value of said Twenty-five-horsepower Engine, Boiler and the mill going therewith, at the time the defendant received the same as aforesaid has been and is as much as $2,000.

The plaintiff prays judgment against the defendant for $3,500, and interest at 10 per cent per annum from March 10, 1883, and cost of suit.

BENNETT, HARKNESS & KIRKPATRICK,
Plaintiff's Attorneys.

CRAWFORD & RICH,
of Counsel.

Territory of Utah,
Salt Lake County. } ss.

L. B. Mattison being duly sworn, says he is the agent of the plaintiff, which is a corporation not in the Territory of Utah; that affiant acted as plaintiff's agent in the business mentioned in the complaint, and is familiar with the facts. That the foregoing complaint is true of his own knowledge, except as to mat-

ters stated on information and belief, and as to those matters he believes it true.

L. B. MATTISON.

Subscribed and sworn to before me July 17, 1883.

A. H. WINN,
Notary Public.

[SEAL.]

Endorsed:

No. 372. First District Court, Utah.

RUSSELL and Co., vs. H. O. HARKNESS.

Complaint.

Filed July 19, 1883.

A. C. EMERSON, Clerk,
By T. A. PERKINS, Deputy.

In the District Court of the First Judicial District of the Territory of Utah, Weber County.

RUSSELL and Co., Plaintiffs, vs. H. O. HARKNESS, Defendant. } SUMMONS.

The People of the Territory of Utah, send greeting to H. O. Harkness, defendant: You are hereby required to appear in an action brought against you by the above-named plaintiff in the District Court of the First Judicial District of the Territory of Utah, and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this summons if served within this county; or, if served out of this county, but in this district, within twenty days; otherwise within forty days, or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to recover the sum of $3,500, alleged to be due and owing plaintiff from defendant on account of certain machinery bought by

defendant from the firm of Phelan and Ferguson, March 9, 1883, and by defendant converted to his own use, at a time when the said Phelan and Ferguson had no title thereto, said title, it is alleged, then resting in plaintiff, and said Phelan and Ferguson and defendant herein having had notice of such fact. Also for interest at 10 per cent. per annum on said sum from March 10, 1883, and for cost herein. For fuller particulars reference is hereby made to said complaint on file herein.

And you are hereby notified, that if you fail to appear and answer the said complaint as above required, the said plaintiff will take judgment against you for the sum of $3,500, with interest as aforesaid and for costs of suit.

Witness, the Hon. Philip H. Emerson, Judge, and the Seal of the District Court of the First Judicial District, in and for the Territory of Utah, this 19th day of July, in the year of our Lord one thousand eight hundred and eighty-three.

A. C. EMERSON, CLERK,
[Seal.] By T. A. PERKINS, Deputy.

Endorsed:

No. 372. Original.

District Court, First Judicial District, County of Weber.

RUSSELL & Co., Plaintiffs,
vs.
H. O. HARKNESS, Defendant. } SUMMONS.

BENNETT, HARKNESS & KIRKPATRICK,
Plaintiffs' Attorneys.

Filed on return, July 23, 1883.

A. C. EMERSON, Clerk,
By T. A. PERKINS, Deputy.

Territory of Utah, County of Weber. } ss.

In the District Court, First Judicial District.

RUSSELL & Co., Plaintiffs, vs. H. O. HARKNESS, Defendant. } Demurrer to Complaint.

Comes now the above-named defendant and demurring to the complaint on file in the above entitled action for ground of demurrer says that said complaint does not state facts sufficient to constitute a cause of action.

KIMBALL & HEYWOOD,
Attorneys for Defendant.

Territory of Utah, County of Weber, } ss.

James N. Kimball being duly sworn says that he is one of the attorneys for the defendant in the above entitled action, and the foregoing demurrer is not interposed for delay merely.

JAMES N. KIMBALL.

Subscribed and sworn to this 25th day of July, A. D. 1883, before me,

WM. V. HELFRICH,
[Seal.] Notary Public.

Endorsements:

No. 372.

In the District Court, First Judicial District, County of Weber, Territory of Utah.

RUSSELL and Co., vs. H. O. HARKNESS. } Demurrer.

Filed July 26, 1883.

A. C. EMERSON, Clerk,
By T. A. PERKINS, Deputy.

Received service of the demurrer by a copy delivered to us this 27th day of July, 1883.

BENNETT, HARKNESS & KIRKPATRICK,
Attorneys for Plaintiffs.

KIMBALL & HEYWOOD,
Attorneys for Defendants.

In the District Court of the First Judicial District of the Territory of Utah.

RUSSELL and Co., a Corporation,
vs.
H. O. HARKNESS, Defendant. } Stipulation.

It is stipulated that upon the demurrer herein in this Court, and on any appeal on the demurrer, these facts may be taken as true as fully as if alleged in the complaint:

The property mentioned in the complaint was originally sold at Salt Lake City to a resident of Idaho and shipped to Phelan and Ferguson in Idaho, and there sold to the defendant.

The chattel mortgage saw of Idaho, as contained in the statutes of that Territory, may be considered as fully as if set out in full in the complaint.

Ogden, November 21, 1883.

BENNETT, HARKNESS & KIRKPATRICK,
Attorneys for Plaintiffs.

KIMBALL & HEYWOOD,
Attorneys for Defendant.

Endorsed:
No. 372.

In the District Court, First Judicial District,

Russell and Co., vs. H. O. Harkness.	}	Stipulation.

Filed November 21, 1883.

A. C. Emerson, Clerk,

Bennett, Harkness & Kirkpatrick,
Attorneys for Plaintiffs.

Kimball & Heywood,
Attorneys for Defendant.

In the First Judicial District Court, of Utah Territory, County of Weber.

Russell & Co., Plaintiffs, vs. H. O. Harkness, Defendant.	}	Order Overruling Demurrer.

This cause having heretofore, to wit: On the 21st day of November, 1883, been duly brought to argument upon the demurrer of the defendant to the plaintiff's complaint herein, and having been submitted to the Court, and by the Court taken under advisement.

Now at this day comes the Court, and being fully advised in the premises, and due deliberation being thereupon had, does order that the said demurrer of the defendant to the said plaintiff's complaint be, and the same is hereby overruled, to which ruling of the Court the defendant, by his counsel, excepts.

It is further ordered that the said defendant have fifteen days from this date to file his answer therein.

In open Court December 31, 1883.

Philip H. Emerson,
Judge.

In the District Court of the First Judicial District of the Territory of Utah, County of Weber.

RUSSELL and Co., Plaintiffs,
vs.
H. O. HARKNESS, Defendant.
} Answer.

Comes now the defendant above named, and answering the complaint on file in the above entitled action against him, admits that the plaintiff was, on the 2d day of October, 1882, the owner and in possession of the property described in the complaint; that prior to said day said plaintiff, at Salt Lake City, Utah, sold said property to a resident of Idaho Territory, to be shipped to said Territory of Idaho, and be used therein.

That on said 2d day of October, 1882, said plaintiff, then being the owner and in possession of said property, sold the same to Phelan and Ferguson, in Idaho Territory, to be used and operated therein; that from said day until the date of the sale and delivery of said property to the defendant hereafter alleged, the said Phelan and Ferguson were in possession of said property and using it in said Territory of Idaho, that at the date of the sale of said property to said Phelan and Ferguson, as defendant is informed and believes, and so charges the fact to be, said Phelan and Ferguson agreed to pay therefor the sum of about forty-nine hundred and eighty-eight dollars, and at said time paid a part of said purchase price to plaintiff, who then delivered the said property to the said Phelan and Ferguson, and took from them for the balance of said purchase money their promissory notes and contracts; that of the said notes and contracts so given the said Phelan and Ferguson had, as defendant is informed and believes, and so charges the fact to be at the time of the sale and delivery of said property to defendant as hereinafter alleged, paid and

performed all of them except seven, four of which are in the words and figures following, to wit, except the date of making and amount in one of them:

SALT LAKE, October 2, 1882.

On or before the first day of May, 1883, for value in one Sixteen-horsepower Engine and Boiler, No. 1,026, and a portable Saw-mill complete, No. 127, bought of L. B. Mattison, agent of Russell and Co., we or either of us promise to pay to the order of Russell and Co., Massillon, Ohio, three hundred dollars, payable at Wells, Fargo and Co's Bank, Salt Lake City, Utah Territory, with 10 per cent. interest per annum, from October 1, 1882, until paid, and reasonable attorneys fees or any costs that may be paid or incurred in any action or proceeding instituted for the collection of this note or enforcement of this covenant. The express condition of this transaction is such that the ownership or possession of said Engine, Boiler and Saw-mill, does not pass from the said Russell and Co., until this note and interest shall have been paid in full, and the said Russell and Co., or his agent has full favor to declare this note due, and take possession of said Engine, Boiler and Saw-mill, when they may deem themselves insecure, even before the maturity of this note; and it is further agreed by the makers hereof that if said note is not paid at maturity, that the interest shall be 2 per cent. per month from maturity hereof till paid, both before and after judgment, if any should be rendered. In case said Engine, Boiler and Saw-mill shall be taken back, Russell and Co., may sell the same at public or private sale without notice, and apply the proceeds on the note, or they may, without sale endorse the true value of the property on this note, and we agree to pay on the note any balance due thereon, after such endorsements, as damages and rental of said machinery, as to this debt we waive the right to exempt or claim as exempt any property, real or personal we now own,

or may hereafter acquire by virtue of any homestead or exemption law, State or Federal, now in force, or that hereafter may be enacted.

P. O. Oxford, Oneida County, Idaho Territory.

PHELAN & FERGUSON.

That the other three notes of this series were and are payable respectively on the 1st day of November, 1883, the 1st day of May, 1884, and the 1st day of November, 1884, the last of which is for $275, instead of $300. The other three notes were given for and on account of the second Engine, Boiler and Sawmill described in the complaint, and each bear date at Salt Lake, October 2, 1882, and are for the sums of $450, $450 and $560,50, respectively, and were and are payable on the 1st day of August, 1883, the 1st day of August, 1884, and February 1, 1885, respectively, and are in other respects identical in language with the one above set forth, and these and none other are the contracts and delivery under which said property was delivered to Phelan and Ferguson.

That at the date of the sale of said property by the plaintiff to Phelan and Ferguson, and at the date of the sale and delivery of said property by Phelan and Ferguson to this defendant, as hereinafter alleged, an act of the Legislative Assembly of Idaho Territory, entitled "an act concerning chattel mortgages," approved January 12, 1875, had among other provisions the following:

"Be it enacted by the Legislative Assembly of the Territory of Idaho, as follows:

"SECTION 1. Chattel mortgages may be made on all property, goods or chattels, not defined by statute to be real estate. No mortgage made by virtue of this act shall have any legal force or effect (except between the parties thereto,) unless the residence of the mortgagor or mortgagee, the sum to be secured and

the rate of interest to be paid, when and where payable, shall be set out in the mortgage, and the mortgagor shall make affidavit that the mortgage is bona fide, and made without any design to defraud and delay creditors, which affidavit shall be attached to such mortgage.

"SEC. 2. All mortgages made in pursuance of this act with the affidavit attached, shall be recorded in the county where the mortgagor lives, and also in the county where the property is located.

"SEC. 3. No chattel mortgage shall be valid except between the parties, unless the same shall have been made, executed and recorded in conformity with the provisions of this act, provided, however, if the mortgagee receives and retains actual possession of the property mortgaged, he may omit the recording of his mortgage during the continuance of such actual possession.

"SEC. 4. A right of redemption shall remain in the mortgagor until the same shall have been foreclosed by due process of law, or by agreement between the parties to the mortgage, which agreement shall be entered on the record of the mortgage."

That on the 2d day of December, 1882, while said Phelan and Ferguson were in possession of said property, and using the same, as hereinbefore alleged, they, in consideration of and in payment of an indebtedness then due and owing from them to this defendant and Jesse M. Langsdorf, co-partners under the name of Harkness & Co., amounting to about eight thousand dollars, delivered said property, together with other property, to this defendant.

That defendant at the time of the sale and delivery of said property to him as aforesaid, did not have notice of the contracts between plaintiffs and Phelan and Ferguson, and the same has never been recorded as provided by the said law of Idaho Territory, and have not been recorded at all.

2d. Defendant further answering said complaint, upon his information and belief, denies that said plaintiff has, ever since October 2, 1881, or at any time since said date, been the owner of the property described in the complaint, or of any part of it.

Defendant admits that on or before March 9, 1882, to wit: On December 2, 1882, the said Phelan and Ferguson had become insolvent and unable to pay their debts, and had delivered all of said property to him, but he denies that he received said property, or any part of it, with full or any other notice to plaintiffs' right or contracts with said Phelan and Ferguson.

Defendant, upon his information and belief, denies that said Sixteen-horsepower Engine and Boiler, and Saw-mill going therewith, was at the time he received the same or at any time since, of the value of $1,500, or of any sum greater than $600, and defendant, upon his information and belief, denies that said Twenty-five-horsepower Engine, Boiler and Saw-mill going therewith, was at the time he received the same, or at any time since, of the value of $2,600, or of any value greater than the sum of $900.

Wherefore defendant prays that he may be hence dismissed without day, and plaintiff take nothing by its complaint, and that he do have and recover his costs in this behalf expended.

KIMBALL & HEYWOOD,
Attorneys for Defendant.

Territory of Utah, }
County of Weber, } ss.

Henry O. Harkness, being duly sworn, deposes and says that he is the defendant in the above entitled action; that he has heard the foregoing com-

plaint read and knows its contents; that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true.

H. O. HARKNESS.

Subscribed and sworn to February 2, 1884, before me.

ABBOTT R. HEYWOOD,
Notary Public.

[Seal.]

Endorsed:

No. 372.

In the District Court, First Judicial District, County of Weber, Territory of Utah.

RUSSELL and Co., vs. H. O. HARKNESS. } Demurrer.

Answer Filed March 11, 1884.

A. C. EMERSON, Clerk,
By T. A. PERKINS, Deputy.

We hereby acknowledge to have received due service of this answer this 12th day of March, 1884.

BENNETT, HARKNESS & KIRKPATRICK,
Attorneys for Plaintiffs.

KIMBALL & HEYWOOD,
Attorneys for Defendants.

In the District Court, of the First Judicial District of the Territory of Utah, County of Weber.

May Term, 1884.

RUSSELL and Co., Plaintiffs, vs. H. O. HARKNESS, Defendant. } Submission.

This cause came regularly for trial. The said parties appeared in Court by their respective counsel

Messrs, Bennett, Harkness and Kirkpatrick for plaintiff, and Messrs. Kimball and Heywood for defendant. A trial by jury is expressly waived by the parties, and the cause tried by the Court sitting without a jury. After hearing the evidence of witnesses, and the argument by counsel, the cause is submitted to the Court, and by the Court taken under advisement.

P. H. EMERSON,

May 19, 1884. Judge.

In the First Judicial District Court of Utah Territory, County of Weber.

RUSSELL & Co., Plaintiffs,
vs.
H. O. HARKNESS, Defendant.

FINDINGS.

A jury trial herein having been waived and the cause regularly tried before the Court, and submitted and taken under advisement, the facts and conclusions of law are found as follows:

1.

On the 2d day of October, 1882, plaintiff was the owner of the property described in the complaint. The property was then situated in Oneida County, Idaho Territory, and in possession of the plaintiff.

2.

On said 2d day of October, 1882, the plaintiff delivered said property to Phelan and Ferguson, in said county of Oneida, Idaho, under contract for the sale thereof set forth in certain notes given for part of the purchase price, and the agreed value of the property was about $4,988, and a small part thereof was

paid in cash, and the notes of Phelan and Ferguson were given for the remainder.

3.

At the commencement of the suit the following notes held by plaintiff were unpaid:

One due	May 1, 1883, for	$300,00
"	Nov. 1, 1883, "	300,00
"	May 1, 1884, "	300,00
"	Nov. 1, 1884, "	275,00
"	Aug. 1, 1883, "	450,00
"	Aug. 1, 1884, "	460,00
"	Feb. 1, 1885, "	560,50

4.

The first note mentioned in findings "3" above, is "No. 2496 B."

SALT LAKE CITY, Oct. 2, 1882.

On or before the first day of May, 1883, for value received in one Sixteen-horse portable Engine, No. 1,026, and one portable Saw-mill, No. 128, all complete, bought of L. B. Mattison, agent of Russell and Co., we, or either of us, promise to pay to the order of Russell and Co., Massillon, Ohio, $300, payable at Wells, Fargo and Co's Bank, Salt Lake City, Utah Territory, with 10 per cent. interest per annum from October 1, 1882, until paid, and reasonable attorney's fees, or any costs that may be paid or incurred in any action or proceeding instituted for the collection of this note or enforcement of this covenant. The express condition of this transaction is such that the title, ownership or possession of said Engine and Saw-mill does not pass from the said Russell and Co. until this note and interest shall have been paid in full, and the said Russell and Co. or his agent has full power to declare this note due and take possession of said Engine and Saw-mill when they may deem themselves insecure,

even before the maturity of this note, and it is further agreed by the makers hereof, that if said note is not paid at maturity, that the interest shall be two per cent. per month from maturity hereof till paid, both before and after judgment, if any should be rendered. In case said Saw-mill and Engine shall be taken back, Russell and Co. may sell the same at public or private sale without notice, or they may without sale endorse the true value of the property on this note, and we agree to pay on the note any balance due thereon after such endorsement, as damages and rental for said machinery. As to this debt we waive the right to exempt or claim as exempt any property, real or personal, we now own, or may hereafter acquire, by virtue of any homestead or exemption law, State or Federal, now in force, or that hereafter may be enacted.

P. O. Oxford, Oneida County, Idaho Territory.

PHELAN & FERGUSON.

$300.

And each of said notes was in the same form, differing only in amount, date of maturity, and part of said notes being given for an engine and mill other than the one described in the above note copied in full.

5.

That Phelan and Ferguson remained in possession of the property described in the complaint, and used the same, in said county of Oneida, Idaho, until the 2d day of December, 1882, and then sold and delivered the said property to the defendant in part payment of and indebtedness past due to him and Jesse M. Langsdorf and the said defendant at the time of and prior to said sale, knew the purchase price of said properiy had not been paid, and that plaintiff claimed title thereto until such payment was made.

That on and prior to October 2, 1882, and continuously until after December 2, 1882, Phelan and Ferguson were residents of Oneida County, Idaho.

6.

That the value of the Sixteen-horsepower Engine and mill and fixtures, on the 2d day of December, 1882, was $700, and there was then and still is unpaid on notes given by Phelan and Ferguson for said property, much more than that sum. That the value of the Twenty-five-horsepower Engine and mill and fixtures on the 2d day of December, 1882, was $900, and there was then and still is unpaid on the said notes of Phelan and Ferguson given for said property a much larger sum.

7

That continuously since May 12, 1875, the law of the Territory of Idaho has contained the following provisions concerning chattel mortgages and said provisions are still in force, and since the date last aforesaid have been and are the law of that Territory:

SEC. 1. Chattel mortgages may be made on all property, goods or chattels not defined by statute to be real estate. No mortgage made by virtue of this act shall have any legal force or effect (except as between the parties thereto), unless the residence of the mortgagor or mortgagee, the sum to be secured and rate of interest to be paid, when and where payable, shall be set out in the mortgage, and the mortgagor shall make affidavit that the mortgage is bona fide and made without any design to defraud and delay creditors, which affidavit shall be attached to such mortgage.

SEC. 2. All mortgages made in pursuance of this act with the affidavit attached, shall be recorded in the county where the mortgagor lives and also in the county where the property is located.

SEC. 3. No chattel mortgage shall be valid except between the parties, unless the same shall have been duly made, executed and recorded in conformity with the provisions of this act, provided, however, if the mortgagor receives and retains actual possession of the property mortgaged, he may omit the recording of his mortgage during the continuance of such actual possession.

SEC. 4. A right of redemption shall remain in the mortgagor until the same shall have been foreclosed by due procees of law or by agreement between the said parties to the mortgage, which agreement shall be entered on the record of the mortgage.

8.

No affidavit was made or attached to either of said notes, nor was either ever recorded.

9.

It was the intention of Phelan and Ferguson and Russell and Co., that the title to said property should not pass from Russell and Co. until all the notes were paid.

And as conclusions of law it is found:

1.

The transaction between Phelan and Ferguson and Russell and Co. was a conditional or executory sale, and not an absolute sale with a lien reserved, and that the title did not pass to Phelan and Ferguson or from them to the defendant,

2.

That the defendant has converted the property of the plaintiff.

3.

That the plaintiff is entitled to judgment against the defendant for sixteen hundred dollars and interest

at ten per cent. per annum thereon from December 2, 1882, and costs of suit, and judgment therefor is ordered.

Dated July 5, 1884. By the Court.

P. H. EMERSON,
Judge.

Exceptions to the defendant.

Endorsed:

No. 372.

District Court, First Judicial District, Weber County.

RUSSELL and Co.,
vs.
H. O. HARKNESS.

FINDINGS.

Filed July 5, 1885.

A. C. EMERSON, Clerk.

In the District Court, of the First Judicial District of the Territory of Utah, County of Weber.

RUSSELL and Co., Plaintiffs,
vs.
H. O. HARKNESS, Defendant.

Judgment by the Court, July 5, 1884.

This cause came on regularly for trial on the 19th day of May, A. D. 1884. Messrs. Bennett, Harkness and Kirkpatrick appeared as counsel for the plaintiff, and Messrs. Kimball and Heywood as counsel for defendant. A trial by jury having been expressly waived by the parties, the cause was tried by the Court without a jury. Witnesses on the part of plaintiff and defendant were sworn and examined, and documentary evidence introduced by the respective parties. The evidence being closed, the cause was submitted to the Court, and by the Court taken under advisement.

Now at this day, after due deliberation, the Court files its findings of fact, and conclusions of law in writing and orders that judgment be rendered herein in favor of plaintiff in accordance therewith.

Wherefore by virtue of the law and by the reason of the premises aforesaid, it is ordered, adjudged and decreed that Russell and Co., the plaintiff herein, do have and recover of and from the defendant H. O. Harkness the sum of $1,600, with interest at 10 per cent. per annum thereon from December 2, 1882, together with said plaintiffs' costs and disbursments incurred in this action amounting to $44.90.

P. H. EMERSON,
Judge.

Ogden, July 5, 1884.

In the District Court, of the First Judicial District, of Utah Territory.

RUSSELL & Co., Plaintiffs,
vs.
H. O. HARKNESS, Defendant. } Notice of Appeal.

You will please take notice that the defendant hereby appeals to the Supreme Court of the Territory of Utah, from the judgment therein made and entered in the said District Court, on the 5th day of July, A. D. 1884, in favor of plaintiff in said action and against said defendant, and from the whole thereof.

Dated this 21st day of August, A. D. 1884.

KIMBALL & HEYWOOD,
Attorneys for Defendant.

To BENNETT, HARKNESS & KIRKPATRICK,
Attorneys for Plaintiffs.

Endorsed:
No. 372.

In the District Court, First Judicial District.

RUSSELL and Co.,
vs.
H. O. HARKNESS. } Notice of Appeal.

Filed August 21, 1884.

A. C. EMERSON, Clerk.

Due service of this notice is hereby acknowledged, August 21, 1884.

BENNETT, HARKNESS & KIRKPATRICK,
Attorneys for Plaintiffs.

KIMBALL & HEYWOOD,
Attorneys for Defendant.

In the District Court, of the First Judicial District of the Territory of Utah.

RUSSELL & Co., a Corporation,
vs.
H. O. HARKNESS, Defendant. } Undertaking on Appeal from Money Judgment.

Whereas the defendant in the above entitled action has appealed to the Supreme Court of the Territory of Utah, from a judgment made and entered against him in said action in the said District Court, in favor of the plaintiff in said action, on the 5th day of July, A. D. 1884, for $1,600, and $44,90 cost of suit, and from the whole thereof.

Now, therefore, in consideration of the premises, and of such appeal, we the undersigned residents of the County of Weber, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against him on said appeal or on a dismissal thereof, not exceeding $300 to which amount we acknowledge ourselves jointly and severally bound.

And whereas the defendant is desirous of staying the execution of the said judgment so appealed from, we do further, in consideration thereof and of the premises jointly and severally undertake and promise and do acknowledge ourselves further jointly and severally bound in the further sum of $3,500 (being double the amount named in said judgment), that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by said judgment, or the part of said amount as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal and that if the appellant does not make such payment within thirty (30) days after the filing of the remittitur from the Supreme Court in the Court from which the appeal is taken, judgment may be entered on the motion of the respondent, in his favor against the undersigned sureties for said sum of $1,644.90, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal.

Witness our hands and seal this 21st day of August, A. D. 1884.

J. M. LANGSDORF. [Seal]
M. H. BEARDSLEY. [Seal]

Territory of Utah, }
County of Weber. } ss.

Jesse M. Langsdorf and Mills H. Beardsley, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself, says: That he is worth the amount specified in said undertaking as the penalty thereof, over and above all his just debts and

liabilities exclusive of property exempt from execution, and that he is a resident and freeholder within Utah Territory.

J. M. LANGSDORF.
M. H. BEARDSLEY.

Subscribed and sworn to before me this 21st day of August, A. D. 1884

ABBOTT R. HEYWOOD,
Notary Public.

[Seal.]

Endorsed.

No. 372.

In the District Court, First Judicial District.

RUSSELL & Co.,
vs.
H. O. HARKNESS,

Undertaking on appeal from money judgment.
Filed August 23, 1884.

A. C. EMERSON, CLERK,

Territory of Utah,
County of Weber. } ss.

I, A. C. Emerson, Clerk of the First Judicial District Court of Utah Territory, do hereby certify that the above and foregoing are full, true and correct copies of the original complaint, summons, demurrer to complaint, stipulation, order overruling demurrer, answer, notice of trial, findings, judgment, notice of appeal and undertaking on appeal in the above entitled action, as appears from the record and files, in said action now in my office.

Witness my hand and seal of said District Court, at my office in Ogden City, this 12th day of September, A. D. 1884.

[Seal] A. C. EMERSON, Clerk.

Thursday, January 15th, A. D. 1885.

A session of the Supreme Court of Utah Territory, was held this day, beginning at 10 o'clock a. m., pursuant to adjournment. Present, all the Justices, the Clerk, Marshal and members of the bar. Court was duly opened.

RUSSELL & Co., Respondents,
vs.
H. O. HARKNESS, Appellant.
} From First District.

This cause coming on regularly for hearing, was argued by J. N. Kimball for appellant, R. Harkness for respondent; submitted and taken under advisement.

Tuesday, January 20th, A. D. 1885.

A session of the Supreme Court of Utah Territory was held this day, beginning at 10 o'clock a. m., pursuant to adjournment. Present and presiding the Hon. Charles S. Zane, Chief Justice, present also the Hon. Philip H. Emerson, Associate Justice and the Hon. Stephen P. Twiss, Associate Justice, the Clerk, Marshal and members of the bar. Court was duly opened.

RUSSELL and Co., Respondents,
vs.
H. O. HARKNESS, Appellant.

This cause having been heretofore argued and submitted, and the Court being sufficiently advised thereon, it is now here considered, ordered and adjudged that the judgment of the District Court therein be and the same is hereby affirmed, and that respondent have and recover of and from appellant sixteen dollars costs.

Thereupon counsel of appellant prayed the allowance of an appeal from this judgment, to the

Supreme Court of the United States and asked that the amount of a supersedeas bond to be given thereon be now fixed, and counsel of respondents being present and not objecting, it is ordered that the appeal so prayed be and is allowed, and the amount of said bond be and is fixed at $3,500.

In the Supreme Court of the Territory of Utah.

RUSSELL & Co., Respondents,
vs.
H. O. HARKNESS, Appellant.

Supersedeas bond on Appeal to the Supreme Court of the United States.

Know all men by these presents, that we, Henry O. Harkness, of McCammon, in the County of Bingham, in the Territory of Idaho, as principal, and Jesse M. Langsdorf and John S. Lewis, of Ogden City, in the County of Weber, and Territory of Utah, as sureties, are held and firmly bound unto Russell & Co., a corporation organized and existing under and by virtue of the laws of the State of Ohio, in the sum of thirty-five hundred ($3,500) dollars, to be paid to the said Russell & Co., its successor or successors and assigns, to which payment well and truly to be made, we do bind ourselves, and each of ourselves, our and each of our heirs, executors and administrators, and every of them firmly by these presents. Sealed with our seals, dated the 9th (ninth) day of February, A. D. 1885.

Whereas on the 20th day of January, A. D. 1885, the Supreme Court of the Territory of Utah, did make and enter a judgment in the above entitled action affirming a judgment of the District Court of the First Judicial District of Utah Territory, rendered on the 5th day of July, 1884, in an action then pending in said District Court, wherein the above named Russell & Co., was plaintiff, and the above named Henry

O. Harkness, was defendant, in favor of said Russell & Co., and against said H. O. Harkness, for the sum of sixteen hundred dollars, together with interest thereon at the rate of ten per cent. per annum from December 2d, 1882, and together with costs taxed at $44,90, and whereas the said Henry O. Harkness did on the said 20th day of January, A. D. 1885, pray in open Court, an appeal from said judgment of said Supreme Court of Utah Territory, to the Supreme Court of the United States, which appeal was by said Supreme Court of Utah Territory, allowed, and a supersedeas bond on such appeal was by it fixed at the sum of thirty-five hundred dollars.

Now, therefore, the condition of this obligation is such, that if the above bounden Henry O. Harkness shall prosecute his said appeal to effect, and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

In presence of James N. Kimball
Henry O. Harkness, [Seal.]
Jesse M. Langsdorf, [Seal.]
John S. Lewis, [Seal.]

Territory of Utah, County of Weber. } ss.

Jesse M. Langsdorf and John S. Lewis, the sureties named in the above bond, being severally duly sworn, each for himself and not one for the other deposes and says that he is a resident and freeholder in said county, and worth the sum specified in said bond as the penalty thereof, over and above all his just debts and liabilities exclusive of property exempt from execution.

Subscribed and sworn to before me Feb. 9th, 1885.

JESSE M. LANGDSORF.
JOHN S. LEWIS.

ABBOTT R. HEYWOOD,
[Seal.] Notary Public.

Endorsed:

In the Supreme Court of Utah Territory.

RUSSELL & Co.,
vs.
H. O. HARKNESS.

Supersedeas bond on Appeal to the U. S. Supreme Court.

Filed February 12th, 1885. E. T. Sprague, Clerk. Approved February 12th, 1885. C. S. Zane, Chief Justice, Supreme Court of Utah. Kimball and Heywood, Attorneys for H. O. Harkness.

Territory of Utah,
County of Salt Lake. } ss.

I, E. T. Sprague, Clerk of the Supreme Court of said Territory, in pursuance of an appeal allowed by said court in the cause of Russell & Co., Respondents, vs. H. O. Harkness, Appellant, do return herewith a transcript of record and proceedings in and of said court in said cause, with bond on appeal, to the Supreme Court of the United States. And I hereby certify that the said annexed transcript of the said record, proceedings and bond is a true, full, correct and complete copy of the several originals thereof on file or of record in my office.

In witness whereof, I have hereunto set my hand and the seal of said Supreme Court of said Territory of Utah, this 27th day of July, A. D. 1885, at Salt Lake City.

[Seal.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

No opinion filed.—E. T. S.

118-663

Office Supreme Court U. S.
FILED.
SEP 19 1885
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT
OF THE UNITED STATES.

No. .....

H. O. HARKNESS,

APPELLANT.

vs.

RUSSELL & CO.,

APPELLEE.

APPELLANT'S BRIEF.

JAMES N. KIMBALL
AND
ABBOT R. HEYWOOD,
Attorneys for Appellant.

PARLEY L. WILLIAMS,
Of Counsel for Appellant.

Endorsed:

In the Supreme Court of Utah Territory.

RUSSELL & Co.,
vs.
H. O. HARKNESS.

Supersedeas bond on Appeal to the U. S. Supreme Court.

Filed February 12th, 1885. E. T. Sprague, Clerk. Approved February 12th, 1885. C. S. Zane, Chief Justice, Supreme Court of Utah. Kimball and Heywood, Attorneys for H. O. Harkness.

Territory of Utah,
County of Salt Lake. } ss.

I, E. T. Sprague, Clerk of the Supreme Court of said Territory, in pursuance of an appeal allowed by said court in the cause of Russell & Co., Respondents, vs. H. O. Harkness, Appellant, do return herewith a transcript of record and proceedings in and of said court in said cause, with bond on appeal, to the Supreme Court of the United States. And I hereby certify that the said annexed transcript of the said record, proceedings and bond is a true, full, correct and complete copy of the several originals thereof on file or of record in my office.

In witness whereof, I have hereunto set my hand and the seal of said Supreme Court of said Territory of Utah, this 27th day of July, A. D. 1885, at Salt Lake City.

[Seal.] E. T. SPRAGUE,

Clerk of Supreme Court of Utah Territory.

No opinion filed.—E. T. S.

118-663

Office Supreme Court U. S.
FILED.
SEP 19 1885
JAMES H. MCKENNEY,
CLERK.

IN THE SUPREME COURT
OF THE UNITED STATES.

No......

H. O. HARKNESS,

APPELLANT.

vs.

RUSSELL & CO.,

APPELLEE.

APPELLANT'S BRIEF.

JAMES N. KIMBALL
AND
ABBOT R. HEYWOOD,
Attorneys for Appellant.

PARLEY L. WILLIAMS,
Of Counsel for Appellant.

IN THE SUPREME COURT

OF THE UNITED STATES.

ON APPEAL FROM THE SUPREME COURT OF UTAH TERRITORY.

H. O. HARKNESS,

Appellant.

vs.

RUSSELL & CO.,

Appellee.

STATEMENT OF FACTS.

This action was brought originally, in the District Court of the First Judicial District of Utah Territory, by Russell & Co., plaintiff below, on the 19th day of July, 1883, against H. O. Harkness, defendant below, to recover damages for the conversion of certain personal property, described in the complaint.

TRANSCRIPT PAGES, 1 TO 5.

The defendant answered the complaint, March 11th, 1883.

TRANSCRIPT PP. 11 TO 16.

On May 19th, 1884, the action was tried by the Court, a jury being expressly waived.

TRANSCRIPT PP. 16 AND 17.

On July 5th, 1884, the Court made and filed findings of fact and conclusions of law, which findings and conclusions are as follows, and contain all the facts and questions involved on this appeal:

1.

On the 2d day of October, 1882, plaintiff was the owner of the property described in the complaint. The property was then situated in Oneida County, Idaho Territory, and in possession of the plaintiff.

2.

On said 2d day of October, 1882, the plaintiff delivered said property to Phelan and Ferguson, in said county of Oneida, Idaho; under contract for the sale thereof set forth in certain notes given for part of the purchase price, and the agreed value of the property was about $4,988, and a small part thereof was paid in cash, and the notes of Phelan and Ferguson were given for the remainder.

3.

At the commencement of the suit the following notes held by plaintiff were unpaid:

One due	May 1, 1883,	for	$300,00
"	Nov. 1, 1883,	"	300,00
"	May 1, 1884,	"	300,00
"	Nov. 1, 1884,	"	275,00
"	Aug. 1, 1883,	"	450,00
"	Aug. 1, 1884,	"	460,00
"	Feb. 1, 1885,	"	560,50

The first note mentioned in findings "3" above, is "No. 2496 B."

SALT LAKE CITY, Oct. 2, 1882.

On or before the first day of May, 1883, for value received in one Sixteen-horse portable Engine, No. 1,026, and one portable Saw-mill, No 128, all complete, bought of L. B. Mattison, agent of Russell and Co., we, or either of us, promise to pay to the order of Russell and Co., Massillon, Ohio, $300, payable at Wells, Fargo and Co's Bank, Salt Lake City, Utah Territory, with 10 per cent. interest per annum from October 1, 1882, until paid, and reasonable attorney's fees, or any costs that my be paid or incurred in any action or proceeding instituted for the collection of this note or enforcement of this covenant. The express condition of this transaction is such that the title, ownership or possession of said Engine and Saw-mill does not pass from the said Russell and Co., until this note and interest shall have been paid in full, and the said Russell and Co., or his agent, has full power to declare this note due, and take possession of said Engine and Saw-mill when they may deem themselves insecure, even before the maturity of this note, and it is further agreed by the makers hereof, that if said note is not paid at maturity, that the interest shall be two per cent. per month from maturity hereof till paid, both before and after judgment, if any should be rendered. In case said Saw-mill and Engine shall be taken back, Russell and Co. may sell the same at public or private sale, without notice, or they may without sale, endorse the true value of the property on this note, and we agree to pay on the note, any balance due thereon after such endorsement, as damages and rental for said machinery. As to this debt we waive the right to exempt or claim as exempt, any property, real or personal, we now own, or may here-

after acquire, by virtue of any homestead or exemption law, State or Federal, now in force, or that hereafter may be enacted.

P. O. Oxford, Oneida County, Idaho Territory.

PHELAN & FERGUSON.

$300.

And each of said notes was in the same form, differing only in amount, date of maturity, and part of said notes being given for an engine and mill other than the one described in the above note copied in full.

5.

That Phelan and Ferguson remained in possession of the property described in the complaint, and used the same, in said county of Oneida, Idaho, until the 2d day of December, 1882, and then sold and delivered the said property to the defendant in part payment of and indebtedness past due to him and Jesse M. Langsdorf, and the said defendant at the time of and prior to said sale, knew the purchase price of said property had not been paid, and that plaintiff claimed title thereto until such payment was made. That on and prior to October 2, 1882, and continuously until after December 2, 1882, Phelan and Ferguson were residents of Oneida County, Idaho.

6.

That the value of the Sixteen-horsepower Engine and mill and fixtures, on the 2d day of December, 1882, was $700, and there was then and still is unpaid on notes given by Phelan and Ferguson for said property, much more than that sum. That the value of the Twenty-five-horsepower Engine and Mill and fixtures on the 2d day of December, 1882, was $900,

and there was then and still is unpaid on the said notes of Phelan and Ferguson given for said property a much larger sum.

7.

That continuously since May 12, 1875, the law of the Territory of Idaho, has contained the following provisions concerning chattel mortgages, and said provisions are still in force, and since the date last aforesaid have been and are the law of that Territory:

SEC. 1. Chattel mortgages may be made on all property, goods or chattels, not defined by statue to be real estate. No mortgage made by virtue of this act shall have any legal force or effect (except as between the parties thereto), unless the residence of the mortgagor or mortgagee, the sum to be secured and rate of interest to be paid, when and where payable, shall be set out in the mortgage, and the mortgagor shall make affidavit that the mortgage is bona fide, and made without any design to defraud and delay creditors, which affidavit shall be attached to such mortgage.

SEC. 2. All mortgages made in pursuance of this act, with the affidavit attached, shall be recorded in the county where the mortgagor lives, and also in the county where the property is located.

SEC. 3. No chattel mortgage shall be valid except between the parties, unless the same shall have been duly made, executed and recorded in conformity with the provisions of this act, provided, however, if the mortgagor receives and retains actual possession of the property mortgaged, he may omit the recording of his mortgage during the continuance of such actual possession.

SEC. 4. A right of redemption shall remain in the mortgagor until the same shall have been foreclosed by due process of law, or by agreement between

the said parties to the mortgage, which agreement shall be entered on the record of the mortgage.

8.

No affidavit was made or attached to either of said notes, nor was either ever recorded.

9.

It was the intention of Phelan and Ferguson and Russell and Co., that the title to said property should not pass from Russell and Co., until all the notes were paid.

And as conclusions of law it is found:

1.

The transaction between Phelan and Ferguson, and Russell and Co., was a conditional or executory sale, and not an absolute sale with a lien reserved, and that the title did not pass to Phelan and Ferguson or from them to the defendant.

2.

That the defendant has converted the property of the plaintiff.

3.

That the plaintiff is entitled to judgment against the defendant, for sixteen hundred dollars and interest at ten per cent. per annum thereon from December 2, 1882, and cost of suit, and judgment therefor is ordered.

TRANSCRIPT PP. 17 TO 22.

On July 5th, 1884, judgment was entered in the District Court, on the findings, in favor of appellant.

TRANSCRIPT PP. 22 AND 23.

On appeal to the Supreme Court of the Territory, this judgment was affirmed, January 20, 1885, and an appeal prayed and allowed to this Court.

TRANSCRIPT PP. 27 AND 28.

ASSIGNMENT OF ERRORS.

1st. The Court below erred in affirming the judgment of the District Court.

2nd. The Court below erred in affirming the conclusions of law found by the District Court.

3rd. The Court below and the District Court erred, in not finding as conclusions from the facts.

1st. That the transaction between Phelan and Ferguson, and Russell and Co. was, as to appellant, an absolute sale, with a lien reserved to Russell and Co.

2nd. That the title to the property mentioned in the complaint passed to appellant by the sale of Phelan and Ferguson.

3rd. That appellant was entitled to judgment against appellee.

BRIEF AND ARGUMENT.

The conclusions of law found by the District Court and its judgment, and the judgment of the Court below are not sustained by the findings of fact.

The contract under which the property was sold to Phelan and Ferguson, (Finding 4, page 18 of the Record) was a chattel mortgage, within the meaning of the statute of Idaho Territory, (Finding 7, page 20, of Transcript, and above and Revised laws of Idaho, page 661.) It was evidently the intention of that statute to prevent all secret liens upon personal property, and it would be against the policy of that law, to permit the appellee to assert title to the property in controversy, after having delivered pos-

session to the purchasers; unless it complied with its provisions in relation to the execution, and recording of the contract. It is true that the contract provides that the title, ownership, or possession of the property, shall not pass from appellee until the full payment of the notes; but that provision taken in connection with the other language of the contract, indicates that the main design of the parties was to enable the appellee to enforce payments of the notes.

The notes were not to be surrendered upon the return of the property, but were to remain the absolute property of the appellee, and bear a greater rate of interest after maturity. Finding 4 above and Transcript page 18.

No part of the money paid before the return of the property was to be returned to the purchasers. Finding 4 above, and Transcript page 18.

Construing the whole contract and notes together, they amount to a sale with a lien reserved to appellee. In Illinois, under a statute providing as follows:

"No mortgage, trust deed, or other conveyance of personal property, having the effect of a mortgage or lien upon such property, is valid as against the rights and interests of any third person, unless the possession thereof be delivered to, and remain with the grantee, or the instrument provide that the possession of the property may remain with the grantor, and the instrument be acknowledged and recorded." (Revised Statutes of Illinois 1874, and Revised Statutes of 1880, ch. 95, sections 1 to 5,) the Supreme Court of that State have construed like contracts, holding them void as to third persons when not recorded.

McCormick vs. Hadden, 37 ill., 447.
Ketchum vs. Watson, 24 ill., 591.
Murch vs. Wright, 46 ill., 488.
Lucas vs. Campbell, 88 ill., 447.

The Statute of Colorado Territory, in relation to chattel mortgages, was almost identical in language, with that of Illinois above set forth, Revised Statute of Colorado Territory Page 102, and in like effect is the Statue of the state of Colorado now in force. Genl. laws Colo. 1877 ch. 12 sects. 124, 133 and amended laws 1881, p. 45. Under these statutes the Circuit Court of the United States for that state and the State Supreme Court have decided that contracts like those in controversy confer no right on the holders, as to third persons, unless acknowledged and recorded as provided in the Statute.

FRANK, ET. AL. VS. DENVER & R. G. RW. 23. FEDERAL REP. P. 123.

GEORGE VS. TUFTS, 5 COLO., P. 162.

The Supreme Court of the United States have also given a construction to this class of contracts, in two cases; the first, arising under the Statute of Illinois, and the second under the Statute of Missouri, relating to chattel mortgages.

In the first case, Hervey et al vs. R. I. Locomotive Works 93, U. S. 664, the contract was in the form of a lease, with a provision that when the last installment of rent was paid, the property should become the property of the lessee.

Mr. Justice Davis in rendering the opinion for the court, says: "The Courts of Illinois say that to suffer without notice to the world, the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to the third persons. Accordingly, the actual owner of personal property creating an interest in another, to whom it is delivered, if desirous of preserving a lien upon it, must comply with the provisions of the chattel mortgage act."

"Nor is the transaction changed by assuming the form of a lease."

"In determining the real character of a contract, courts will always look to its purpose, rather than to the name given it by the parties."

"If that purpose be to give the vendor a lien upon the property until payment in full of the purchase money, it is liable to be defeated by creditors of the purchaser, who is in the possession of it." Or, by a sale by the party in possession, as we claim in this case.

In the above case the property was an engine, which was delivered by the Locomotive Works, and taken to Illinois, and seized under legal process, and sold as the property of the lessee.

The court held the sale valid, and that it vested the title in the purchaser, the contract not having been recorded in compliance with the law of Illinois.

The second case above referred to is, Heryford vs. Davis, 102, U. S, 235. In this case, also, the contract under consideration was in the form of a lease or loaning, made by the Jackson & Sharp Co., and the Keokuk and Kansas City Railway Co., and was as follws:

"That the party of the first part has constructed one passenger car, No. 1, and one mail, baggage, and express car, also No. 1, and lettered with the name of the aforesaid railway company, to be used on the railroad of the party of the second part for hire," and then proceeds: "It is therefore agreed as follows: The said party of the first part hereby agrees to loan to the said party of the second part, for hire, the said passenger, and mail, baggage, and express cars for the space of four months from date of this agreement, to be used on said railway, and to deliver the same to the party of the second part at Wilmington, Delaware, to be transported to the said railway company, at Salisbury, Missouri, at the expense and risk of the party of the second part, to be used on the said

railway for hire as aforesaid, and not elsewhere, without the written consent of the party of the first part.

"The party of the first part has received from the party of the second part, three promissory notes of the party of the second part, to the order of the Western Construction Co., and endorsed by A. C. Vandewater, President, F. A. Jones, John Foggett, A. C. Vandewater, G. P. Lawrence, John C. Noyes, and J. W. Morse, together with thirteen of the first-mortgage bonds of said railway company, of $1,000 each, as collaterals for said notes; two of said notes are dated Nov. 14, 1873, one payable at sixty days, and the other at four months, each for $1,919,20, payable, with interest at the rate of ten per cent. per annum, after date, at the Mercantile Bank of St. Louis, Missouri; the other of said notes is dated Dec. 15, 1873, payable at four months, for $2,583, without interest, at the National Bank of Commerce, New York, which said three notes the said party of the first part is to hold as collateral security, and to collect the same at maturity, and to hold the proceeds, when collected, for the safe custody, and return to the party of the first part, when demanded, of the said passenger, and mail, baggage, and express cars, delivered to the party of the second part for the term of four months, for hire, as aforesaid, the said party of the second part to have the right and privilege to purchase at any time, the said passenger, and mail, baggage, and express cars, within the period of four months from aforesaid date, upon the payment to the party of the first part in cash, the sum of $6,338,40, with interest at the rate of ten per cent. per annum from date of the agreement until the day of payment; but until such payment is made in full, the said party of the second part shall have no right, title, claim or interest, in and to the said passenger, and mail, baggage and express cars, except as to their use or hire, nor any right or authority in any way to dispose of, hire, sell, mortgage

or pledge the same, but the said cars are, and shall remain, the property of the party of the first part, to be accounted for by the party of the second part, to the party of the first part, and to be redelivered to the party of the first part, when demanded, in default of the payment of the aforesaid sum of $6,338,40, with interest as aforesaid, hereinbefore described, anything to the contrary herein contained notwithstanding.

"It is also agreed that should there be any default in the payment of any one of the above described three promissory notes, at the time and on the day that they, or either of them, respectively become due and payable, and the party of the first part shall elect to take into their own possession, the above described passenger and mail, baggage and express cars, delivered as aforesaid, the several sums which may have been collected on account of the above described promissory notes, are to be retained by the party of the first part for their own use, and the passenger and the mail, baggage and express cars are to be sold by the party of the first part, at public or private sale, and of the net amount realized from said sale, so much as should be needed to make the amount remaining due and unpaid on the above described promissory notes, with the interest that may have accrued on the same, shall be retained by the said party of the first part, and the surplus, if any, shall be paid over to the said party of the second part.

"And the said party of the first part hereby agrees with the said party of the second part, that if all the said three promissory notes are paid on the day and at the time that they severally become due and payable, according to their terms, tenor and effect, that upon payment of all the said notes having been made without any hinderance or delay whatever, the party of the first part will then relinquish their ownership to the said passenger car and the mail, baggage,

and express car, and will give to the party of the second part, a good and sufficient bill of sale, or conveyance for the said cars, and will apply to the payment of the same, the proceeds of the above described promissory notes, interest on notes overdue in any event, to belong to the party of the first part.

"And it is also agreed and understood that, if the said notes are paid according to their tenor and effect, the said party of the first part may retain the money paid upon said notes, and then the said cars shall belong to, and be the property of the said party of the second part, and the said party of the first part shall, on request, relinquish their ownership thereof, and make a bill of sale or conveyance of all their right, title and interest therein, to the said party of the second part.

"In witness whereof, the parties have hereto set their name and caused the seal of their respective corporations to be affixed.

[SEAL.] "JACKSON AND SHARP COMPANY.
"JOB H. JACKSON.
"THE KEOKUK AND KANSAS CITY RY. CO.,
By S. H. MELVIN, President.
[SEAL.] "ALBERT BLAIR, Secretary."

The cars were delivered to the Railway Campany and shipped to Missouri, to be used, and were used on its railway in that state.

While so in use, and in the possession of the railway company, they were levied upon and sold as its property under an execution in favor of Heryford. Before the sale, the Jackson & Sharp Company notified Davis, the sheriff, that the cars belonged to it, and he notified Heryford of the claim, who gave an indemnifying bond.

The action was brought by Davis, upon the bond for the use of the Jackson & Sharp Company.

The Statute of Missouri in relation to chattel mortgages, enacts that "No mortgage or deed of trust of personal property, shall be valid against any other person than the parties thereto, unless the mortgaged or trust property be delivered to, or retained by the mortgagee, or CESTUI QUE TRUST, or unless the mortgage or deed of trust be acknowledged or proved, and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are, by law, directed to be acknowledged or proved and recorded.

Mr. Justice Strong delivering the opinion of the court said: "The correct determination of this case depends altogether upon the construction to be given to the contract between the Jackson & Sharp Company and the Railroad Company, against which the defendants below recovered their judgment and obtained their execution. If that contract was a mere lease of the cars to the Railroad Company, or if it was only a conditional sale, which did not pass the ownership until the condition should be performed, the property was not subject to levy and sale under execution at the suit of the defendant against the company. But, if on the other hand the title passed by the contract, and what was reserved by the Jackson & Sharp Company was a lien, or security for the payment of the price, or what is called sometimes a mortgage back to the vendors, the cars were subject to levy and sale, as the property of the Railroad Company."

Referring to the Statute of Missouri cited above, the court says: "The plain purpose of this statute was to render secret liens upon personal property ineffectual, as against purchasers or creditors."

The property in this case was in possession of the Railroad Company when the levy was made, and the contract under which the company held was not recorded."

"What then, is the true construction of the contract?" The answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provisions it contains, disconnected from all others, but, in the ruling intention of the parties, gathered from all the language they have used." "It is the legal effect of the whole which is sought for." The form of the instrument is of little account.

After referring to the provisions of the contract, the court hold that it was not a letting or bailment for hire, and that it was not a conditional sale, but that it was in effect a chattel mortgage, and to be effectual against creditors or purchasers from the Railroad Company should have been recorded.

The case at bar falls fully within the reasoning of the Court in the foregoing case. The form of the contract cannot vary its effect.

"The property being sold in Idaho, and remaining there until sold to appellant, (Findings 1, 2 and 5 above, and Transcript pp. 17, 18 and 19,) its transfer is regulated by the laws of that Territory, notwithstanding the respondent was a resident of, and the contract appears to have been made in another jurisdiction.

GREEN vs. VAN BUSKIRK, 5 WALL, 307.

SAME vs. SAME, 7 WALL, 139.

HERVEY ET AL vs. R. I. LOCOMOTIVE WORKS, 93 U. S. 664.

The contract of sale was not proved or recorded in compliance with the law of Idaho, (Findings 5, 7 and 8 above, and Transcript pp. 19, 20 and 21.) The purchasers being in possession of the property on December 22d, 1882, and then selling it to appellant, he acquired a valid title against appellee.

While it is true that appellant, at the time he purchased the property had notice that it was not paid for, and that respondent claimed title to it. (See Findings 5 above, and Transcript page 19,) these facts do not effect his title or render it invalid.

Unrecorded mortgages being void against persons other than the parties to them, (See Section 3, of Idaho Statute, in Finding 7 above, and Transcript page 20,) such mortgages have no validity against subsequent purchasers and mortgagees, although they have actual notice of the prior mortgage.

Jones on Chattel Mortgages, Sec. 314.
Bingham vs. Jordan, 1st Allen, 373.
Travis vs. Bishop, 13 Met. 304.
Gassner vs. Patterson, 23, Cal. 299.
Donaldson vs. Johnson, 2 Chand (Wis.) 160.
Garland vs. Plummer, 72 Me. 397.
Wilson vs. Milligan, 75 Mo. 41.
Kennedy vs, Shaw, et al., 38 Ind. 474.
Matlock vs. Straughn, 21 Ind. 128.
Sage vs. Browning, 51 Ill. 217.
Frank vs. Miner, 50 Ill. 444.
Dowell vs. Stewart, 83 Ill. 538.
Lemen vs. Robinson, 59 Ill. 115.

As against appellee, the law must be construed strictly, and it must show a substantial compliance with all of its provisions, before it can claim title as against appellant.

Gasner vs. Patterson, 23 Cal. 299.
Crane vs. Chandler, 5 Colo. 21.

The consideration paid by appellant, was a valuable one, to-wit: The surrender of a part of his debt against Phelan & Ferguson, and sufficient to vest the title to the property in him, as against appellee.

Bingham vs. Jordan, et. al., 1 Allen, 374.

Lockwood vs. Selvin, et. al. 26 Ind. 124.

Gasner vs. Patterson, 23 Cal. 299.

Babcock vs. Jordon, 24 Ind. 14.

Frey vs. Clifford, 44 Cal. 335.

It may be contended that taking the property for an antecedent debt, with notice of the contract, and claim of appellee makes appellant a purchaser, "in bad faith;" and his purchase fraudulent as to respondent. If this position is assumed it is sufficient to say, that no fraud, either on the part of Phelan & Ferguson, or appellant, is shown or found.

The fact of notice of appellee's claim and contract, would not make appellant a fraudulent purchaser, for as we have seen, the contract was void as to him.

Section 3, page 661, Idaho Laws.

Also, Finding 7, 23 above, and Transcript pp. 20 and 21.

This case and cases arising under Chattel Mortgage Acts, similar to the Idaho act, are not governed by the provisions of law relating to fraudulent conveyances, but are to be constructed solely with reference to the provisions of the Chattel Mortgage Act.

Gasner vs. Patterson, 23 Cal. 299.

Bingham vs. Jordon, 1 Allen, 363.

And Indiana cases cited above.

Under the authorities above cited, the facts found are not sufficient to constitute a cause of action against appellant. The foregoing is respectfully submitted, and we ask that the conclusions of law be set aside, and the judgment reversed, with directions to

the Supreme Court of Utah, to reverse the judgment of the District Court, and direct such District Court to enter judgment upon findings, of fact, for the defendant.

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AND
ABBOT R. HEYWOOD,
Attorneys for Appellant.

PARLEY L. WILLIAMS,
Of Counsel for Appellant.

114-663

Supreme Court U.S.
FILED.
OCT 10 1885
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM 1885.

No.....

H. O. HARKNESS, *Appellant.*

vs.

RUSSELL & CO., *Appellee.*

BRIEF AND ARGUMENT FOR APPELLEE.

C. W. BENNETT,
Attorney for Appellee.

KIMBALL & HEYWOOD,
Attorneys for Appellant.
P. L. WILLIAMS, Counsel.

In the Supreme Court of the United States.

OCTOBER TERM 1885.

No.....

H. O. HARKNESS, *Appellant.*

vs.

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APPELLEE'S BRIEF.

On the 2nd day of October, A. D. 1882, the appellee, at Salt Lake City, Utah, contracted with Phelan & Ferguson, for the sale of the property described in the complaint. Notes were given by Phelan & Ferguson representing nearly the whole price, and each note contained the contract respecting the property. The note set out in the finding of fact numbered "4," transcript pages 18 and 19, contains the contract expressed in each note. The property was then in Idaho, (Finding 1,) and remained in Idaho until after the alleged conversion.—Finding 5.

In December, 1882, the appellant took the property from Phelan & Ferguson, in part payment of a past due debt, and with notice of appellee's claim.—Finding 5.

It is found as a fact that Phelan & Ferguson and the appellee intended a conditional sale.—Finding 9.

The first finding of law made by the trial court, covers the ground of contention between the parties, and is as follows:

"The transaction between Phelan & Ferguson and Russell & Co., was a conditional or executory sale, and not an absolute sale with a lien

reserved, and that the title did not pass to Phelan & Ferguson or from them to the defendant."

The appellant controverts the finding, and contends:

1. That the transaction amounted to a sale with a reservation of a lien.

2. That being an executed sale, the transaction is governed by the chattel mortgage law of Idaho, and that the lien is void as to appellant, though he purchased with notice and without advancing any new consideration.

In answer to these propositions we contend:

I.

The transaction was not intended to be and was not a present sale.

This proposition is the basis of the whole controversy and involves the construction of the agreement contained in each note.

That a sale of personal property by which the title is not to pass until full payment, is a valid condition, and binding on the conditional vendee and his creditors and vendees, has been held in nearly every State and Territory in which the subject has been considered.

Call vs Seymour, 40 Ohio St., 670.
Brown vs. Haynes, 52 Me., 578.
Rogers vs. Whitehouse, 71 Me., 222.
Kimball vs. Jackson, 42 N. H., 242.
Fisk vs. Ewen, 46 N. H., 173.
Armington vs. Houston, 38 Vermont, 448.
Coggill vs. H. & N. H. Ry. Co., 3 Gray 545.
Burbank vs. Crocker, 7 Gray, 158.
Goodell vs Fairbrother, 12 R. I., 233.
Cragin vs. Coe, 29 Conn., 51.
Hughes vs. Kelley, 40 Conn., 148.
Brown vs. Fitch, 43 Conn., 512.
Hime vs. Roberts, 48 Conn., 267.
Ballard vs. Burgett, 40 N. Y., 314.
Austin vs. Dye, 46 N. Y., 500.
Cole vs. Mann, 62 N. Y., 1.
Parmlee vs. Catherwood, 36 Mo., 479.
Griffin vs. Pugh, 44 Mo., 326.
Ridgeway vs. Kennedy, 52 Mo., 24.
Hall vs. Draper, 20 Kansas, 137.
Cole vs. Berry, 13 Vroom, (N. J.) 308.

Couse vs. Fregent, 11 Mich., 65.
Whitney vs. McConnell, 29 Mich., 14.
Knowlton vs. Redenbaugh, 40 Iowa, 114.
Sumner vs. Woods, 67 Ala., 139.
Hunter vs. Warner, 1st Wis., 141.
Pitts vs. Owen; 9th Wis., 152.
Kohler vs. Hays, 41 Cal., 455.
Cardinal vs. Edwards, 5 Nev., 36.
Singer M. Co. vs. Graham, 8th Or , 17.
Bradshaw vs. Warner, 54 Ind., 58.
Hudson vs. Warner, 60 Ind., 214.
McGinn vs. Sells, 60 Ind., 249.
Himbreckel vs. Zugbaum, 5 Mont., 344.
Benjamin on Sales, 3d Ed., Sec. 320 and note.

In these cases verbal and written contracts in various forms, and under a variety of circumstances are considered. It was competent to the owner of the property and the proposed vendees, to contract on terms to which they could agree, and their written contract is not ambiguous, when all its terms are considered. They expressly agreed the title should not pass until the purchase price was paid. This condition is set out in unmistakable terms. It is true they say the "possession" shall not pass, but the parties will not be held to the use of language in its technical legal sense, and the whole contract shows they intended the conditional vendees should not have the possession of a purchaser, or possession which could not at any time be interrupted by the plaintiff in accordance with the terms of the contract. There is nothing in the contract to show any waiver or intended waiver of this express condition. It is said the instrument shows the vendor could, at its option, collect the debt, either with or without resort to the property, and hence it was in legal effect an absolute sale. It was within the power of the parties to so agree without a waiver of the condition. They could in words have agreed, and in legal effect they did agree upon the value of the property; that the vendor should absolutely receive that amount, either wholly in money, or in money and the property in its depreciated condition if taken back, and that the title should not pass until full payment. The vendor under such an agreement could stipulate to retain the property, until full payment, and thus make the agreement wholly executory, in the meantime holding the property for delivery upon payment, and the agreement to deliver and pass the title after payment, would be a good consideration for the promise to pay. This is, in effect, the present agreement, except

that the vendor permitted the vendee to have a qualified possession in the meantime, and the fact that the qualified possession was given, and the property became subject to depreciation by the use and misuse of the vendees, made it necessary to protect the vendor against this depreciation.

The judgment in this case shows the necessity of protection against such damages to the property, for the value of the property is found to be about half of the amount due on the notes. Without this agreement by the vendees to pay for depreciation, the vendor would have no remedy in case he should take back the property.

Hine vs. Roberts, 48 Conn., 257.

The agreement, that the purchase price should be fully paid, was not a waiver of the conditions as to when the title should pass, but was made to secure the vendor the estimated value in money and in the property in case the property depreciated. The clause for a sale of the property, in the connection in which it stands and construed with other provisions, is only a means of ascertaining the value of the property to show how much it had depreciated and to ascertain the balance which Phelan & Ferguson agreed to pay in case the value of the property when taken back was not equal to the balance of the purchase price. In the absence of a provision to ascertain the value, the value of the property taken back, in case of a suit for the balance of the purchase price under the agreement to pay it as damages and rental, would have to be proved, but here it was agreed it might be ascertained in advance by a sale, to which the parties would be bound in the absence of fraud or negligence on the part of the seller. The whole contract must be construed together, and as this is the fair interpretation of the provision for sale, it is not a waiver of the condition as to title. This is expressly held, on a contract in most respects like this, in

Call vs. Seymour, 40 Ohio St., 670.

In Bean vs. Edge, 84 N. Y. 510. Notes were taken for the value of the property on a transaction called a lease, and with a provision for a sale of the property and application of the proceeds in case of default, and it was held the title did not pass.

There is, however, in the agreement in question, a clause not in the agreement in *Call vs. Seymour, supra.*, and which makes the construction in this case much clearer. In case the vendor retook the property, it was authorized, without sale, to endorse the true value of the property on the notes, and if any balance should remain either after a sale or such endorsement, Phelan & Ferguson agreed to pay it "*as damages and rental*

for said machinery." It may be said that a sale, under a power is an appropriate way to pass the title of another, but it is equally appropriate for the purpose of ascertaining only the value of the property, and may be resorted to by any vendor after a tender of the property, and as a means of ascertaining his damages for a breach of the contract to purchase. But in regard to the endorsement of the value, no such contention would seem tenable. The plaintiff does not agree to buy back the property and Phelan & Ferguson do not agree to sell it, and no negotiation is provided for looking to a resale. The property is regarded as belonging to the plaintiff, and it is authorized to fix the valuation as a means of ascertaining the damages and rental. And this right is an alternate of the right of sale, and both are for the same purpose. As there was no lease the word "rental" was used in the sense of "use," and it would be inconsistent for Phelan & Ferguson to agree to pay for the damages to, and for the use of their own property, which they held by an actual sale, but understanding it was a conditional sale and the property remained that of the appellee the provision is entirely consistent with all the terms of the agreement. The plaintiff, under this contract, could probably have pursued either of two courses; collected the price, leaving the property in the hands of Phelan & Ferguson, the title not passing until payment, or it could retake the property, treat the condition of the sale as broken and fix the damages by sale, or endorsement of the value.

In either event, the conditional vendee acquired no title. While we think the contract is not ambiguous in the main condition, if such ambiguity exists in its terms, the intention of the parties is found as a fact, (9th finding of facts), and as the appellant purchased with notice, (5th finding of facts) it was his duty to ascertain the true meaning of the agreement.

Cases from Illinois are cited, holding, in effect, such sales are within the statute of frauds in that state. These decisions are against the whole current of authority. Probably every State and Territory whose decisions are cited, have in substance the same statute of frauds, and numerous cases answer the objections. In Ballard vs. Burgess, (40 N. Y. 314) it is said that conditional sales have no tendency to defraud, more than a mere bailment, and as the conditional vendee has only the possession, a purchaser, even in good faith, cannot rely on that. So far as the statute of frauds is concerned, the Appellant here has no standing in view of the facts found.

In one of the Illinois cases cited, it is also said these conditional sales are in fraud of the Chattel Mortgage Act. This is only a corollary

of the holding that conditional sales, as to creditors and purchasers without notice, stand on the same basis as absolute sales, in which we think the decisions of that State stand nearly alone.

It is also claimed that this Court, in two decisions, has construed like contracts to be absolute sales, and *Hervey etal vs. R. I. Locomotive Works* (93 U. S. 664) and *Heyford vs. Davis* (102 U. S. 235) are cited.

The first of these cases came up from Illinois, and as there was no federal question involved, the Court followed the Illinois cases. Counsel for appellant admitted the case was subject to the laws of Illinois, the Court so treated it and cited only Illinois decisions. This case is referred to in *Fosdich vs. Schall*, (99 U. S. p. 235–250) and it is shown to have been made in conformity to the Illinois decisions. In *Murch vs. Wright* (46th Ill. 488) it was held that an agreement purporting to be a *lease*, and by which the pretended rental equalled the value of the property, and in consideration of the payment of which the title was to be given, was not a lease, but a sale, and in *Harvey vs. R. I. Locomotive Works*, the agreement was of the same nature.

In *Heyford vs. Davis* (102 U. S. 235) this Court does not decide that conditional sales are not valid either against creditors of, or purchasers from the conditional vendee, or that such sales are within Chattel Mortgage Acts, unless expressly named in the Acts.

On the contrary the opening clause of the opinion (p. 243) shows the question which was considered, and it was held the contract made an absolute sale with a lien reserved, and hence was within the Chattel Mortgage Act of Missouri; but the opinion expressly says that if it was a conditional sale, the property was not subject to levy. It is to be noticed this decision does not follow the Illinois cases, which seem to hold that a conditional sale, with possession given, stands on the same basis as to creditors as an absolute sale, but on the contrary recognizes the validity of conditional sales. The decision is therefore authority that the contract in that case was not a conditional sale, and necessarily leaves to construction the effect of contracts differing in their nature and terms.

The contract in that case purported to be a lease. It was not a lease, for the rental was the whole price of the property, and the payment collaterally secured. As the contract did not truly state the intent of the parties, the Court was at liberty to reject what they did say and put a construction to the contract such as its whole terms required, unaided by a true expression of the parties as to their meaning. It is true the contract said the lessee should have no interest except as lessee for hire, and that the property should remain that of the lessor until full payment,

but as they had declared the instrument a lease, this was only stating the legal incident of such a relation, and showed no intent to declare their rights independent of that falsely assumed relation. In that case the provisions forsale and application of the proceeds were those of an ordinary foreclosure sale made to pass title. They were not such as are appropriate to fix the amount of depreciation of the property, or, as in this case, connected with language showing such to be the object of sale. The differences in the two contracts are material.

Again, in the case of *Heyford vs. Davis*, there is a provision for the payment of any excess of proceeds to the vendee, thus recognizing the title would be foreclosed and the general owner would receive the balance. Here there is no such provision. The appellee was to be made good, but if it took back the property, it took it as its own, and could stand on any forfeiture the contract gave if the property was worth more than the balance of the purchase price, but retained the right to be made whole if the value was less than such balance.

In the case last cited the Court notices the provisions of the contract were intended as *security*. While that may have been a proper consideration in that case, we submit that in the construction of such contracts generally but little aid can be obtained from that reason. While the object of a lien is security, such also is the object in withholding the title from an insolvent or doubtfully solvent conditional vendee, and if this consideration should be made a decisive test, a conditional sale would be impossible.

II.

The contention of appellant that the case is within the Chattel Mortgage Act, is a sequence of his claim that the contract was an absolute, present sale and passed the title to the property. A mortgage implies that the mortgagor is the general owner of the property, and gives a lien on his title by the mortgage. If he has no title he cannot give a lien on it by mortgage or otherwise, unless the owner does some act which estops him from asserting his title.

Chattel mortgage acts were in existence in the States that have held conditional sales valid, but it has never been held that such acts embraced conditional sales, where conditional sales are recognized as valid. In Illinois, as already noticed, and also it appears in Colorado, such sales are held invalid as against creditors and hence within the mortgage acts. The case of *George vs Tufts*, (5th Colo., 162) follows and cites the Illinois cases, but the provisions of the contracts (a series of notes) are not set out, and we do not know the precise terms of the chattel mort-